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September 6, 2011

Corbin R. Davis, Esq.
Clerk, Michigan Supreme Court
P O Box 30052
Lansing MI 48909

re: ADM File #2010-13

Dear Mr. Davis:



On behalf of the American Civil Liberties Union of Michigan, we write in opposition to the above-identified proposed amendment to MCR 6.001(A). Prohibiting discovery in felony cases until after a preliminary examination would negatively affect the quality of justice and increase the administrative burden at both the district and circuit court levels. There would be no offsetting benefit to the administration of justice.

It is by now beyond dispute that discovery promotes the search for the truth. It is similarly indisputable that early discovery promotes the search for the truth more efficiently. Moreover, prosecutors are ethically required to “make *timely* disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the degree of the offense”. MRPC 3.8(d) (emphasis added); see also ABA Model Rules of Professional Conduct 3.8(d). Since it is not at all unusual for the discovery materials in a case either to tend to negate the guilt of the accused or mitigate the degree of the offense, and since appropriate use of those materials in preparing for and conducting a preliminary examination is important in ensuring that a case proceed to trial only on the basis of sufficient competent evidence as to the specific charge(s) brought, the proposed ban on pre-examination discovery also conflicts with a prosecutor’s ethical obligation to make *timely* disclosure of potentially exonerating or mitigating evidence.

When criminal defense counsel is able to obtain discovery prior to preliminary examination, counsel is able to make better informed decisions as to holding or waiving the examination and as to what issues are viable in the case and should be pursued at examination, if an examination is to be held. For these reasons, delaying discovery until after preliminary examination would result in –

- (1) fewer waivers of preliminary examinations,
- (2) longer examinations in cases where an examination is held, and
- (3) fewer preliminary examinations that are successful at screening out those cases that either should not have been brought or in which the charges are greater than is warranted

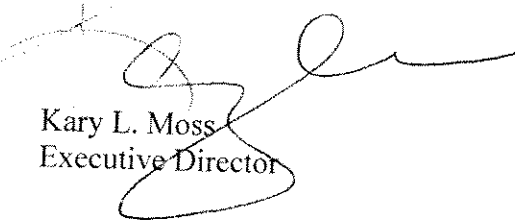
by the evidence.

Further, prosecutors offices around the state are well-used to the current rules. In many counties, copies of discovery materials are routinely prepared for defense counsel at or near the time of issuance of the complaint and warrant. With the increasingly frequent use of scanning and email in law enforcement and in the practice of law, the time and expense involved in providing defense counsel with discovery materials is decreasing over time. That is, complying with the current rule imposes no unfair burden on law enforcement or prosecutors' offices. Moreover, delaying disclosure until after preliminary examination would not save any prosecutorial resources, since the material would still remain subject to disclosure.

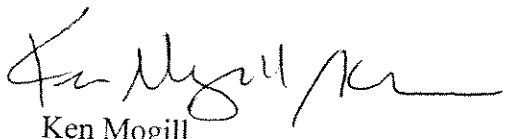
Finally, it should also be noted that Michigan's criminal defense system is already badly broken, as it fails significantly to meet the American Bar Association Ten Principles of a Public Defense Delivery System (2002) and the State Bar of Michigan's Eleven Principles of a Public Defense Deliver System (2002). *Cf., e.g.,* National Legal Aid and Defender Association, "A Race to the Bottom: Speed & Savings Over Due Process – A Constitutional Crisis" (June 2008). Imposing a further impediment to the effective performance of defense services would, for this reason, be particularly cruel.

In the total absence of any benefits to the legal system to be gained from delaying disclosure of discovery materials in felony cases and in light of the substantial harm to the system that would result from delaying disclosure of discovery materials, the proposed amendment should be rejected by the Court.

Sincerely,



Kary L. Moss
Executive Director



Ken Mogill
ACLU Cooperating Attorney

Cc: Shelli Weisberg
Michael Steinberg